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d/b/a/ Indy Men's Magazine

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GEORGE EDWARD McCAIN, an individual,	:
	:
Plaintiff,	:
	:
vs.	:
	:
RAHAL LETTERMAN RACING, LLC, an Ohio	:
limited liability company, <i>et al.</i>	:
	:
Defendants.	:
	:
----- X	

Index No.: 07-CV-5729 (JSR)

**REPLY MEMORANDUM
IN SUPPORT OF
MOTION TO TRANSFER CASE**

Defendant Table Moose Media, LLC, d/b/a Indy Men's Magazine ("TMM") respectfully submits this reply memorandum in further support of the motion of defendants Rahal Letterman Racing, LLC, and Bobby Rahal Automotive Group (collectively "Rahal") for an Order transferring this copyright infringement action to the United States District Court for the Central District of California pursuant to 28 U.S.C. Section 1404(a). TMM joined Rahal's motion to transfer on July 26, 2007.

TMM joins the arguments advanced by Rahal in their Reply Memorandum of Law Re Motion to Transfer (“Rahal Reply Mem.”), filed on August 13, 2007. In addition, it is in the interests of justice to transfer this case and permit TMM, as an alleged “secondary infringer,” to litigate the parties’ dispute in the Central District of California, where Argent Mortgage Company, LLC, et al. v. Edward McCain, Case No. SACV 06-749 CJC (RNBx) (the “California Proceeding”) is pending, for the simple reason that each of the parties to the alleged “primary” infringement are amenable to personal jurisdiction in that jurisdiction, and there is considerable uncertainty as to whether that would be the case in the Southern District of New York.

The relationships between and among the alleged “primary infringers”—the Rahal entities, Argent Mortgage Company LLC (“Argent”), and Argent’s one-time agent Mark Borchetta (“Borchetta”) and his affiliated companies (the “Borchetta Entities”)—and Edward McCain (“Plaintiff”) are the subject of contention and will be the focus of discovery. Nonetheless, it is clear that all are or will be parties to the California Proceeding. For the alleged “secondary infringer” defendants such as TMM, who expect to seek indemnity from one or more of the alleged “primary” infringers, the only jurisdiction where they are assured complete relief is the Central District of California. If one or more of the parties involved in the alleged “primary” infringement are subject to jurisdiction in California but not in New York and the California Proceeding continues in parallel to this present action, the alleged “secondary infringers” could be prejudiced by inconsistent judgments rendered in the two jurisdictions. In contrast, there is no risk of inconsistent judgments, incomplete relief, or prejudice to TMM and the other alleged “secondary infringers” if this case is transferred to the Central District of California, where it would presumably be consolidated with the California Proceeding.

From the allegations raised in this matter and in the California Proceeding, it appears unlikely that Borchetta, and possibly Argent, will be subject to jurisdiction in the Southern District of New York. There is no evidence in the pleadings that Borchetta and the Borchetta Entities are subject to the jurisdiction of this Court. However, they are defendants in the California Proceeding, in which it is alleged that Borchetta and the Borchetta Entities have their principal place of business in Valencia, California. As is apparent from the Amended Complaint filed in the California Proceeding, submitted in support of Rahal's opening memorandum, Borchetta is alleged to have been a key player in the negotiations surrounding the use of the allegedly infringed photographs. (See Affirmation of John W. Patton, Exhibit L (Amended Complaint at ¶¶ 29-42) (filed July 30, 2007).) To the extent that TMM's alleged infringement is derivative of any act or omission by Borchetta or the Borchetta Entities, TMM may be prejudiced if this action were to proceed in the Southern District of New York without their presence. Furthermore, in its August 13, 2007 reply memorandum, Rahal states in a footnote that Argent will need to be joined as a party to this lawsuit for complete relief to be obtained. (Rahal Reply Mem. at 2 n.1). However, Rahal's statement does not indicate whether Argent would concede personal jurisdiction in this district.

WHEREFORE, for the reasons stated in the moving and reply papers filed by Rahal and in TMM's joinder and this reply, defendant Table Moose Media respectfully requests that this action be transferred to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1404(a).

Dated: New York, New York
August 15, 2007

RICHARDS KIBBE & ORBE LLP

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